



European Commission Launches E-Commerce Sector Inquiry

The European Commission (the “Commission”) has launched a sector inquiry of the e-commerce sector in Europe.¹ This is a far-reaching competition review of the sector by the European Union (“EU”) competition authority, bringing potentially significant changes to rules and regulations related to selling online in Europe. The inquiry also carries the risk of enforcement action against individual companies for breaches of the EU antitrust rules. It will affect the activities of all international companies engaged in online selling into and within the EU, regardless of their physical location.

The sector inquiry forms part of a new wider Digital Single Market Strategy by the Commission, which was launched by the Commission on the same day.² The Digital Single Market Strategy (the “Strategy”) identifies and proposes actions to address a number of public (i.e., regulatory) barriers that hinder cross-border e-commerce. The Strategy has the three main objectives of achieving better access for consumers and businesses to digital goods and services across Europe, creating the right conditions and a level playing field for digital networks and innovative services to flourish, and maximizing the growth potential of the digital economy.

The ambitious Strategy sets out 16 specific actions that the Commission will deliver by the end of 2016. These include reviews of regulations relating to copyright, telecoms, e-privacy and data protection, cybersecurity, standards and interoperability, cloud services, VAT, parcel delivery costs, geo-blocking, and consumer protection. The sector inquiry is one of the action points and is designed to identify potential competition concerns affecting European e-commerce markets.

What are Sector Inquiries?

Sector inquiries are competition investigations by the European Commission into sectors of the economy when it believes that a sector is not working as well as it should. The Commission uses the information obtained during an inquiry to understand the market better and decide whether and what action is required to address structural or behavioral competition concerns.

An inquiry is not a formal antitrust investigation of individual companies, although the Commission later may decide to bring enforcement action against individual companies for specific breaches of competition

¹ May 6, 2015, [European Commission, Press Release, “Antitrust: Commission Launches E-Commerce Sector Inquiry.”](#)

² May 6, 2015, [European Commission, Press Release, “A Digital Single Market for Europe: Commission Sets Out 16 Initiatives to Make It Happen.”](#)

law that it finds. Consequently, a sector inquiry risks being something of a “fishing expedition.” For example, when the Commission carried out a pharmaceuticals sector inquiry, it resulted in a number of individual enforcement actions in relation to patent settlements (“pay for delay”). In contrast, in another sector inquiry into business insurance, there was no subsequent enforcement action.

To date, the Commission has undertaken sector inquiries in a small number of sectors, including financial services and energy, and the e-commerce inquiry is the first since the pharmaceuticals sector inquiry during 2008 and 2009. In contrast, in the UK, equivalent market studies and market investigations have been used more extensively over recent years to review the effectiveness of competition in markets, including notably the ongoing investigations in the energy and retail banking sectors.

What are the Concerns about the E-Commerce Sector?

The European Commission is primarily responsible for enforcing the EU antitrust rules, alongside national competition authorities. The main focus of the Commission is on detecting and preventing anticompetitive agreements or practices that hinder cross-border trade between EU Member States. Restrictions on EU cross-border sales have been the subject of enforcement action in the past, leading to the establishment of legal principles and guidelines. There are very few restrictions that lawfully can be placed by a supplier on a reseller’s ability to sell goods and services freely across the EU.

But markets have shifted online to a very significant extent over recent years, and the Commission is concerned that barriers have been put in place that prevent or discourage cross-border selling online. The Commission estimates that this costs consumers €11.7 billion per year. The Commission has estimated that 50 percent of EU citizens shopped online in 2014, but only 15 percent bought something online from another EU Member State, and the rate of cross-border online sales is not growing as quickly as domestic online sales.

The Commission has undertaken a number of antitrust investigations and has identified certain online sales barriers arising from practices and agreements in some specific sectors.

For example, it recently announced dawn raids against a number of companies that sell consumer electrical and electronic products online. It now wishes to undertake a “more thorough and systematic view of the market” as a whole.

The Commission accepts that there may be cultural and language barriers, as well as commercial decisions and consumer preferences, that discourage cross-border online selling. However, it believes that there are significant barriers put in place by suppliers and resellers deliberately to limit it. As a consequence, the law and guidance on vertical restrictions especially in the online sector is to some extent out of date and has not kept up with the fast-moving market. There may also be national regulations or legislation in place that themselves create barriers.

National Investigations

There has been a variety of antitrust enforcement activity at the EU level and in individual Member States, and the EU sector inquiry provides the Commission an opportunity to provide a more coherent EU-wide policy and guidance to Member State competition authorities and companies. For example:

UK. The Competition and Markets Authority (“CMA”) also has announced that digital markets will be one of its enforcement priorities over the next year, 2015 into 2016. It has ongoing research projects to monitor how selective distributors of branded goods are restricted from selling online, including through third-party platforms. The CMA is also carrying out economic research on the use of vertical restrictions generally, including restrictions on online selling, and the reasons for them. The UK has brought various enforcement actions against restrictions on online sales including in relation to mobility scooters, e-books, and online hotel bookings. It has also scrutinized price parity and price relativity agreements in relation to Amazon Marketplace and the sale of private motor insurance on price comparison websites.

France. In 2011–2012, the French Competition Authority (the “Authority”) conducted its own sector inquiry into e-commerce and announced that it would “keep a close eye on the development of competition on and through the Internet.” Since that time, the Authority has remained committed to monitoring the e-commerce sector. It has recently targeted

price parity clauses imposed by online hotel booking platforms (i.e., clauses under which online platforms require hotels to make at least as favorable offers as those offered on competing platforms as well as through other distribution channels), outright bans of online sales in selective distribution systems maintained by cosmetic and hi-fi suppliers, and potential abuses of a dominant position in an offline market aimed at limiting the development of online competition (e.g., for online horserace betting and online sales of train tickets).

Germany. The Federal Cartel Office (“FCO”) has made the online sector one of its enforcement priorities and has taken action in a number of well-publicized cases. The FCO also has stated it would “not be concerned” if enforcement action in Germany turns out to be more aggressive than it currently is in other Member States. In the online hotel booking sector, it prohibited certain most favored nation clauses that the online booking platform HRS had imposed on hotels, and the FCO has recently issued formal charges against Booking.com on similar grounds. After years of scrutiny and negotiation, Amazon yielded to the FCO’s concerns and discontinued requiring price parity clauses in its agreements, which set a precedent for other Member States that followed suit. adidas also deleted restrictions on sales through online market places in its distributor agreements, and the FCO has recently discontinued its settlement negotiations with ASICS and might issue formal charges later this year. In several other cases, the FCO has imposed fines on manufacturers that have tried to impose minimum prices, provided rebates or used discriminatory terms of sales in order to discourage online sales, and/or ordered such manufacturers to discontinue such practices (e.g., sleeping mattresses, household products, gardening tools, bathroom fittings). In one of those cases, an online distributor was awarded follow-on damages of €1 million in a case that went up to the Federal Civil Court. The FCO has also recently requested information from certain OEM car makers to explain their terms for online distribution and levied fines on a manufacturer of portable navigation devices for imposing resale price maintenance in relation to online sales.

Areas of Focus for the Sector Inquiry

The EU Commissioner for Competition Policy, Margrethe Vestager, has indicated that the Commission is initially interested in three areas:

Contractual Arrangements. The Commission will review barriers to the cross-border sale of goods and digital content put in place by private companies, especially in their distribution contracts. There are the more obvious restrictions already addressed by the Commission’s guidelines on vertical agreements such as outright bans on internet sales, limiting the proportion of overall sales made online, or charging a distributor a higher price for goods to be sold online than for products sold in a “bricks and mortar” store. But there may be more indirect ways in which consumers are discouraged from purchasing goods online cross-border such as opaque or excessive delivery charges, or requiring a consultation or demonstration of the product in person. Nevertheless, there can also be justifiable reasons such as language barriers and commercial decisions by individual companies. The Commission stated that 32 percent of retailers refuse to sell to customers in other countries due to contractual restrictions.

Technical Practices. The Commission will investigate practices such as “geo-blocking,” where a consumer may be prevented from accessing certain websites or content or making a purchase on the basis of their IP address location, residence, or credit card billing address, or may be automatically redirected to domestic websites with different prices. The Commission is currently investigating the alleged geo-blocking of online video games and is also investigating territorial restrictions on pay-TV broadcasters, i.e., licensors of movies restricting broadcasters from allowing subscribers outside the relevant country from viewing content.

National Laws and Regulations. The Commission will also review laws and regulations in individual Member States relating to payments, copyright, data protection, standards, labelling and value added tax (“VAT”) which may in themselves create barriers to cross border trade.

The main objective of restrictions on cross-border sales usually is to maintain different price levels in different Member States. Differential pricing across Europe is not generally of itself anticompetitive but may come under scrutiny if accompanied by agreements containing restrictions on how the products or services are sold online across EU borders. The Commission will also look for evidence of limited trade between Member States, lack of new entrants on the market,

price rigidity, and other circumstances that suggest competition may be restricted or distorted.

Potential Outcomes, Timetable, and Next Steps

There is no legislative timetable for sector inquiries. Previous inquiries have lasted for between two and three years. The Commission has said that it intends to publish a report setting out its preliminary findings in mid-2016. The final results of the sector inquiry will be published in a report during the first quarter of 2017. The report itself does not impose remedies but will serve as a reference point for the Commission to decide what actions to take. Alongside the Digital Single Market Strategy, these could include:

- Changes to EU legislation to harmonize certain national laws on issues ranging from copyright to VAT;
- Requirements on Member States to bring their national laws or regulations in line with existing EU legislation;
- Enforcement action against individual companies for breaches of EU competition law; and
- Revised guidelines.

The Commission has wide-ranging powers of investigation. The initial stage of the investigation is likely to involve detailed data and document production requests. The Commission intends to cast a wide net in terms of asking for information from a large number of companies and trade associations across the EU, including holders of digital content rights, broadcasters, manufacturers, wholesalers, and online retailers, including online platforms (price comparison websites and marketplaces). The Commission said that it will focus on product and service sectors where e-commerce is most widespread such as electronics, clothing, and shoes, as well as digital content.

The information requests may include general questions about the national regulatory and legislative provisions, the structure of the market, and identities of key suppliers and customers, but they may also ask for copies of distribution and supply agreements and sensitive pricing information. Responding to these requests can be an onerous process, and there may be a short time period to respond. The Commission will usually issue a voluntary request in the first instance. It is generally advisable to cooperate, as a failure to respond may lead the Commission to issue a mandatory request, and a failure to respond to that may lead to fines. Care should also be taken in how responses to substantive questions are drafted, as fines may be imposed for any incorrect, misleading, or incomplete information. It is also possible that the Commission could undertake dawn raids (as it did in the pharmaceutical sector inquiry).

What Can Companies do to Prepare?

- Watch out for information requests from the Commission and respond within time limits;
- Review existing contractual and informal arrangements in the distribution chain for compliance;
- Consider EU privilege when taking legal advice; and
- Put in place a preparation plan for dawn raids.

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